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IN THE

Supreme Court of the United States

_____ Term, 1958

No. 900

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

v.

CECIL A. THOMAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Court of Civil Appeals, for the Ninth Supreme Judicial District, Beaumont, Texas

MAJOR T. BELL
CLEVE BACHMAN
Counsel for Petitioner

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---

The Kansas City Southern Railway Company, petitioner, prays that a Writ of Certiorari issue to review opinion and judgment of the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, entered in the above entitled cause on September 9, 1957.

Citation to Opinions Below

The judgment of the Trial Court (R. 47) is unreported and is printed in Appendix A hereto, infra, p. 15. The opinion of the Court of Civil Appeals, Ninth Supreme

Judicial District, Beaumont, Texas (R. 377) is printed in Appendix B hereto, infra, p. 17, and is reported in 301 S.W. 2d 642.

Jurisdiction

The judgment of the Trial Court (R. 47) denying petitioner recovery against respondent was entered on the 27th day of November, A. D., 1956. The opinion of the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, reversing and remanding with specific instructions to the Trial Court was handed down on the 19th day of September, 1957 (R. 377), infra, p. 17, and petitioner's motion for rehearing in the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, was overruled the 9th day of October, A. D., 1957 (R. 383). Petitioner's application for Writ of Error to the Supreme Court of Texas (R. 399) was overruled on the 4th day of December, A. D., 1957 (R. 468), and petitioner's motion for rehearing on his application for Writ of Error in the Supreme Court was overruled on the 8th day of January, A. D., 1958 (R. 468).

This Honorable Court has jurisdiction to review the judgment or decrees heretofore mentioned, by Writ of Certiorari under the provisions of Rule 19, Subsection (a), of the *Supreme Court Rules*, and 28 *U. S. C.*, Section 1257, Subsection (3).

Question Presented

This is a Federal Employers' Liability case and the question here is whether a board that split and caused appellant to fall was a "handhold" or a "grab iron" as contemplated by the Safety Appliance Act.

Statutes Involved

The statute involved here is a specific part of the Federal Employers' Liability Act known as the Safety Appliance Act, to-wit:

> "Sec. 4. Grab irons or handholds for security in coupling and uncoupling cars.
>
> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." 45 U.S.C.A., sec. 4, Acts Mar. 2, 1893, C. 196, sec. 4, 27 Stat. 531.

Statement

Cecil Thomas, an employee of The Kansas City Southern Railway Company, sustained personal injuries when a board, which had been bolted along the top of a gondola car on which he was riding, gave way with him, causing him to fall backwards. Thomas contended that the Railway Company was negligent in failing to properly inspect the gondola car, and also claimed specific instances of failure to maintain the car in a safe condition. He also contended that the board which gave way with him was a "handhold" as contemplated by the Safety Appliance Act (R. 12). The Railway Company on the other hand contended it was not negligent and took the position that the board which gave way with Thomas was an inherent part of the construction of the railway car, was not a "handhold" or "grab iron" within the contemplation of the Safety Appliance Act. The jury found that the Rail-

way Company was not negligent in the manner of its maintaining its gondola car or in failing to inspect and in fact found that the event was the result of an unavoidable accident (R. 32-37). They also found that the board was, in effect, a handhold that could be used by the switchman in coupling and uncoupling cars, and that its insecure condition contributed, in whole or in part, to cause the respondent's injuries (R. 32-37). The question, therefore, for this court to decide is whether or not the piece of board, bolted on the top of the gondola car, which Thomas was holding onto when he fell, was a "handhold" or "grab iron" within the purview of the Safety Appliance Act. (Court of Civil Appeals Opinion, Appendix B.)

The Trial Court, having heard all the evidence, and having considered the jury's verdict, found that the plaintiff was not entitled to recover and entered a judgment that the plaintiff take nothing (R. 47).

On appeal, the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, held as a matter of law the piece of board which gave way on the occasion in question was in fact a "handhold" or "grab iron" as contemplated by the provisions of the Safety Appliance Act and thereby reversed the judgment of the trial court, allowing the plaintiff, Cecil Thomas, to recover not on the basis of negligence, but solely on the proposition that the piece of wood was a "handhold" or "grab iron" as contemplated by the Safety Appliance Act. (Court of Civil Appeals Opinion, Appendix B, p. 17.)

The Federal Question, i.e., the applicability of the Employers' Liability Act, and specifically the portion known as the Safety Appliance Act, has been the foundation

stone of the parties' rights from the very inception of the case, having been pled by the plaintiff (R. 12) in his original petition and having been the subject of judicial construction in the judgment of the trial court (R. 47), and having been the basis of the opinion of the Court of Civil Appeals. (Court of Civil Appeals Opinion, Appendix 17.)

Reasons For Granting Writ

This writ should be granted because the State Court (Court of Civil Appeals) has by decision, erroneously, without basis of either law or fact materially changed duties, responsibilities and rights of the railway company under the Safety Appliance Act, from those contemplated by both the Statute and judicial decision. In other words, the broad effect of this decision, if allowed to stand, is to permit an inferior court, or a jury of laymen to substitute their standards as to what equipment constitutes a "safety appliance", rather than looking to the acts itself for guidance.

Section 4 of the Employers Liability Act is the provision under which the plaintiff seeks to impose liability on the defendant in this instance. Section 4 reads as follows, and we quote:

> "§ 4. GRAB IRONS OR HANDHOLDS FOR SECURITY IN COUPLING AND UNCOUPLING CARS.
>
> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that

is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Section 5 concerns the height of drawbars for freight cars and Section 6 provides certain penalties for failure to so equip. Section 7 deals with the assumption of risk by employees. Section 12 provides, and we quote:

"§ 12. SAFETY APPLIANCES AS DESIGNATED BY COMMISSION, TO BE STANDARDS OF EQUIPMENT: MODIFICATION OF STANDARDS HEIGHT OF DRAWBARS.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission *shall remain as the standards of equipment to be used on all cars* subject to the provisions of sections 11-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *."

Section 13 provides other miscellaneous penalties, Section 14 provides liability for using a car with defective equipment; Section 15 provides for enforcement by the Interstate Commerce Commission; and Section 16 provides that the preceding provisions shall be known as the "Safety Appliance Acts."

It seems to be well established by both the Statute above cited and by case law that the duty or responsibility of the railway company for compliance with the requirements, insofar as proper equipment is concerned (i.e., handholds, grab irons, etc.) under the Safety Appliance Act is meas-

ured or fixed by the standards or requirements set by the Interstate Commerce Commission.

Referring to that portion of the Safety Appliance Act concerning ladders on railway cars (Sections 2 and 3) this court in the case *Atcheson, Topeka and Santa Fe v. Scarlett*, 57 Sup. Ct. 541, said:

> *"And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission.* See Kansas City So. Ry. Co. v. United States, 231 U.S. 423, 456, 457, 34 S. Ct. 125, 58 L. Ed. 296, 52 L.R.A. (N.S.) 1; Napier vs. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 612, 47 S. Ct. 207, 209, 71 L. Ed. 432, Mahutga v. Minneapolis, St. P & S.S. M. Ry. Co. 182 Minn. 362, 366, 234, N.W. 474; Auschwitz v. Wabash Ry. Co., 346 Ill. 190, 204, 178 N.E. 403; Ford v. New York, N. H. & H. R. Co. (C.C.A.) 54 F. 2d 342, 343."

In *Illionis Central Railway Company v. Williams*, 242 U.S. 462, it was held that the requirement of the act concerning ladders (Section 3) "shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission; that is, that they shall be standardized."

In the case at bar the railway company was not remiss in its obligations as to proper safety appliances on the car but on the contrary as specifically related by the Court of Civil Appeals in its opinion in this case:

> "However, he has at no time taken the position that the board was a handhold or other safety appliance prescribed by the Interstate Commerce Commission

> under authority of 45 U.S.C.A., SEC. 12; and it is undisputed that the car from which he fell was equipped with all standardized safety appliances prescribed by the Interstate Commerce Commission for care of its class, and they were all secure." (Court of Civil Appeals Opinion, Appendix, Page 17.)

The Court of Civil Appeals in this instance has, by its own admission, gone one step beyond the Statute above quoted (Sec. 12) and cases cited, and has in effect taken the position that it can properly impose liability under the Safety Appliance Act on the railway company, even though by its own evaluation of both the testimony and the evidence in this case the railway company has completely complied with the Interstate Commerce Commission regulations in all respects as concerned "handholds" and "grab irons" on this particular piece of railway equipment.

The equipment which brought about plaintiff's injuries was a gondola car (see picture of equipment R. 304-305), owned by the defendant and used by it for the movement of sulphur. It was lined with wood on the inside, and with wooden timbers along the top rail. The wood had been placed there over the metal for fire prevention and also to keep the sulphur from getting between the steel skin of the gondola car and the wooden lining. In order to get into the car it was necessary to climb over the top rail of the gondola car which was notched at the end just over the regulation grab iron. It should be noted that the board was laid on top of the steel rail and its placement along this rail is *not shown* to have affected the ordinary use of the grab iron in any way.

On the basis of these facts and this Court's holding in the case of *Shield v. Atlantic Coast Line Ry. Co.*, 76 S. Ct. 386, the Court of Civil Appeals judiciously decrees that the board which plaintiff grabbed was a "safety appliance" within the contemplation of the Safety Appliance Act.

It is Respondent's contention that the Court of Civil Appeals has erroneously construed the meaning of the holding in the *Shields* case. A thorough examination of the entire record in this case will reveal that there is no evidence, nor suggestion that the board placed along the top of the gondola or railway car was placed or contemplated as a "safety appliance". In fact, all of the evidence is to the contrary and apparently the only reason the Court of Civil Appeals took the liberty to judicially decree it as a "safety appliance" was because of its proximity to a standardized or required "safety appliance", and second, because the men on occasions used it to hold on to. The net result of the opinion of the Court of Civil Appeals is to hold that a court has the power to adjudicate that a piece of wood or other integral part of a railway car is a "safety appliance", solely because the object (i.e., wood or other part) was located in close proximity to a required "safety appliance" and on occasions was used or appropriated by the railway workmen in lieu of the nearby prescribed safety appliance (grab iron or handhold in this instance).

If the rationale used by the court in this case at bar be accepted as a proper construction of the safety appliance act then there is unlimited liability on the part of the railway company for any part or portion of railway car or locomotive it may own, which may be used inci-

dentally to serve the same function as one of the "required safety appliances" even though the car be equipped as specifically provided for by the Interstate Commerce Commission regulations.

It seems illogical to the writer that when Congress passed the Safety Appliance Act, or this court in the *Shields* case, intended that every jury or every court in the United States that would have occasion to hear a Federal Employers Liability case would have the right, or perhaps the jurisdiction to hold that a piece of equipment or an appendage placed upon a railway car by the railway company for a purpose entirely foreign to the purpose of the Safety Appliance Act. i.e., handholds, grab irons, etc., was as a matter of law a "safety appliance".

It is the writer's impression that in the *Shields* case this court in effect held that whether a "running board" was around the dome or the perimeter of the tank car was not of controlling consequence, but that the fact that the "running board" was placed on the railway car either around the dome or on the perimeter as a "safety device" or "safety appliance" was controlling. In the case at bar the equipment which the Court of Civil Appeals has labeled a "safety appliance" was not placed on the car as a "safety device", or as an aid or a supplement to safety device already on the car, but a board was placed on the top rail of the gondola car for a purpose foreign and entirely different. It obviously was not placed there for the purpose of serving as a "safety appliance" because the prescribed Interstate Commerce Commission handhold or grab iron was located within four inches of the piece of wood and clearly served exactly the purpose for which it was put there. True enough the board, in order to serve the

purpose for which it was attached to the top rail, had to run the entire distance of the gondola car and of a necessity, would have crossed the area immediately above the prescribed grab iron where purely by reason of proximity and not by reason of purpose, it might have been used incidentally to hold on to. But no one can escape the conclusion that whether the top rail of the gondola car be steel as it was originally built, or whether it be steel covered by a piece of wood, its proximity or occasional use does not change its basic character, which is the "top rail of the gondola car" and not a "safety appliance".

The case of *Atcheson T. & S.F. Ry. Co. v. Scarlett*, 57 S. Ct. 541, certainly more nearly fits the fact situation we have here. In that case the railway car was properly equipped as required by the Interstate Commerce Commission with ladders and so on. (Our car was properly equipped). There was a brace rod placed underneath or near the ladder whose principal purpose was bracing. (There was a wood piece on the top rail of the gondola car whose principal purpose was to keep the sulphur from between the inner wood lining and the metal skin of the car and also whose purpose was fire prevention). As a result of the brace rod being at or near or in close proximity to the ladder, Scarlett sustained personal injury. (Because of the close proximity of the top rail to the grab iron plaintiff used it instead of the grab iron and was injured). In that connection this court said and we quote:

> "(6) We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The

right of recovery, if any, must therefore rest upon the effect of near proximity of the ladder to the rod, neither being in itself defective. *The law to be applied to that situation is the commonlaw rule of negligence,* and not the inflexible rule of the Safety Appliance Act; *and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company, and,* if so, whether Scarlett assumed the risk. Ford v. New York, N. H. & H. R. Co., supra; Chicago, R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 199, 185 N.E. 244; Slater v. Chicago, St. P., M. & O. Ry. Co., 146 Minn. 390, 392, 393, 178 N.W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

"Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

The facts in this case are generally undisputed and the failure to review the decision of the Court of Civil Appeals is of far reaching consequence. As this decision stands, this court, by allowing the jury or a court to judicially decree a portion of a railroad car, a safety appliance, under the fact situation which we have here, which is obviously rather typical, this court has:

(1) For practical purposes eliminated the Interstate Commerce Commission as an agency to set the standards for standardized "safety appliances", a function which the act itself specifically delegated to the Commission.

(2) Substituted the judgment of laymen and courts as to what is a "safety appliance" under the Safety Appliance Act.

(3) In effect, it allows the use of the Safety Appliance Act as a device to eliminate the necessity of a party or claimant from proving negligence against the railway company, where any question of condition of equipment is involved, which was not the intention of the act originally except as to said specified types of equipment.

(4) Eliminates any common criterion which the railway company can rely on to determine if it has complied with the Safety Appliance Act.

(5) Creates duties and responsibilities beyond the specific contemplation or suggestion of the intentions of the Safety Appliance Act.

For these reasons, as well as those heretofore pointed out in this argument, this case is not only of considerable consequence to your petitioner but is of importance to the industry as a whole because the fact situation is of a common character and applicable to all.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAJOR T. BELL

CLEVE BACHMAN
Counsel for Petitioner

April 3, 1958

Attorneys for Respondent, Jacobs & Schmidt, 1602 Sterling Building, Houston 2, Texas, and Harold Peterson, McFaddin Building, Beaumont, Texas, have been furnished a copy of this brief by mailing to them at the above stated addresses.

CLEVE BACHMAN

APPENDIX A

No. D-69,623

CECIL A. THOMAS

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

In the District Court of Jefferson County, Texas
136th Judicial District

Judgment

BE IT REMEMBERED that in the above styled and numbered cause came on for hearing at a regular term of court and at a regular setting, and came the parties in person, and by and through their attorneys, and announced ready for trial, and on October 2, 1956, a jury of twelve good and lawful men and women was duly impaneled and sworn; and the jury having heard the pleadings, the evidence, argument of counsel and charge of the court, and the jury returned into the court their verdict on the 5th day of October, 1956, same being duly signed by Denys Manson, Foreman; and, thereafter, came the plaintiff by and through his attorneys and filed his motion for judgment on the verdict, and came the defendant, by and through its attorneys, and filed its motion for judgment on the verdict, or, in the alternative, motion for judgment non obstante veredicto, or, in the alternative, its motion requesting the court to set aside and disregard the answers to Special Issues Nos. 1, 2 and 3 and enter judgment for the defendant and against the plaintiff, together with notice as required by law, and the court having heard argument by both sides and considered said motions and being of the opinion that plaintiff's motion for judgment should

be refused, and defendant's motion for judgment on the verdict granted, and defendant's other motions overruled:

It is, therefore, ORDERED, ADJUDGED and DECREED by the court that the motion for judgment on the verdict, filed by the plaintiff herein, be, and the same is, in all things overruled, to which action of the court the plaintiff then and there in open court excepted.

It is further ORDERED, ADJUDGED AND DECREED that the motion for judgment on the verdict filed by the defendant herein be, and the same is, in all things granted;

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiff recover nothing of and from the defendant, The Kansas City Southern Railway Company; and,

Because of the granting of defendant's motion for judgment on the verdict, it is further ORDERED, ADJUDGED and DECREED by the court that the motion for judgment non obstante veredicto, filed by the defendant herein, and motion requesting the court to set aside and disregard the answers to Special Issues Nos. 1, 2 and 3, be, and the same are hereby, in all things overruled, to which action of the court the defendant then and there in open court excepted; and,

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiff pay all costs of court herein, for which let execution issue as may be necessary and proper.

RENDERED AND SIGNED this the 27th day of November, A. D., 1956.

HAROLD R. CLAYTON
Judge Presiding.

APPENDIX B

OPINION OF THE COURT OF CIVIL APPEALS

September 19, 1957

NO. 6127

CECIL A. THOMAS,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLEE

While working for appellee railway company as a brakeman, appellant fell from the side of a moving gondola car and was injured. This occurred about 2:50 a. m., on October 16, 1955, while both the appellant and the appellee were engaged in interstate commerce. Appellant, who will also be referred to as plaintiff, brought suit for damages, charging the defendant with both negligence and a violation of the Safety Appliance Acts, 45 U.S.C.A., secs. 1-16. A jury answered all special issues pertaining to negligence in favor of the defendant, and further found that the plaintiff fell as the result of an unavoidable accident. However, it answered all issues pertaining to the alleged violation of the Safety Appliance Acts in favor of the plaintiff, and assessed damages in the amount of $50,300.00. Both parties made motion for judgment on the verdict. The defendant also made motion, in the alternative, for judgment non obstante veredicto, and motion that such of the jury's answers as were favorable to the plaintiff be disregarded. Plaintiff's motion and defendant's alternative motions were overruled; defendant's motion for judgment on the verdict was granted; and judgment

was rendered that the plaintiff take nothing. The appeal followed.

There is but one question to be decided. It is that of whether the trial court erred in overruling the plaintiff's motion for judgment on the verdict of the jury, in granting the defendant's, and in rendering judgment accordingly.

The answer lies in whether a board that split and caused appellant to fall was something the Safety Appliance Acts required appellee to have in secure condition.

The board lay along the top of a side wall of the gondola car, at the head of a side ladder, and was fastened in place by bolts. It split and partly gave way when appellant grasped its inner edge while ascending the ladder in the discharge of his duties, and appellant was cast to the ground.

The car from which appellant fell was constructed of steel and was one of a number of similar cars used in hauling raw sulphur. To reduce the fire hazard, and apparently at the behest of sulphur shippers, the cars had been lined inside with oak planks, and a cap of oak boards or timbers had been placed atop the side and end walls. Except where they crossed the heads of ladders, the capping boards or timbers were approximately 5 x 7" in size. Where they crossed the heads of ladders, they were thinner, having apparently been only two inches or a little more in thickness. The board that gave way with appellant was a short piece of board of the lesser thickness, its length approximated the width of the ladder.

The plaintiff charged in his petition that the board was a handhold within the purview of the following provision of the Safety Appliance Acts:

"Sec. 4. Grab irons or handholds for security in coupling and uncoupling cars.

Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." 45 U.S.C.A., sec. 4, Acts Mar. 2, 1893, C. 196, sec. 4, 27 Stat. 531.

However, he has at no time taken the position that the board was a handhold or other safety appliance prescribed by the Interstate Commerce Commission under authority of 45 U.S.C.A., sec. 12; and it is undisputed that the car from which he fell was equipped with all standardized safety appliances prescribed by the Interstate Commerce Commission for cars of its class, and they were all secure.

The jury found that the board was "in effect a handhold that could be used by switchmen in coupling and uncoupling cars"; that it was not secure; and that its insecure condition "contributed in whole or in part to cause" appellant's injuries. It also found that the board was a "dangerous instrumentality with which to work."

The record does not expressly reflect the fact, but these findings were nonetheless disregarded by the trial court in rendering judgment. They appear, however, to have been disregarded because they were thought to be immaterial rather than because there was thought to be no evidence to support them. In other words, as we understand the record, the trial judge concluded that, as a matter of law, the board that gave way with appellant was not a grab iron or handhold within the scope of the above-quoted provision of the Safety Appliance Acts.

After much deliberation, and with no sure nor even satisfactory guide, we have arrived at the opposite conclusion. In other words, we are of the opinion that the board that gave way with appellant was, as a matter of law, something the Safety Appliance Acts required appellee to have in secure condition.

The board's position rendered it inevitable that frequently, if not invariably, it would be grasped by anyone entering or leaving the car by way of the ladder or seeking or departing a position atop the wall of the car or standing high on the ladder or passing from the ladder to its counterpart on the end of the car. And in the absence of another and better explanation, we think it must be inferred that it was in recognition of this fact and with the view of making it easier and safer for people to grasp them that thinner boards were used across the heads of ladders than elsewhere. In addition, the boards at the heads of ladders were regularly used by appellee's employees as handholds, and this practice was known to appellee. The conclusion is inescapable, therefore, that the board that gave way with appellant was both designed and intended as a handhold, and as a practical matter was a handhold, even though considerations other than the installation of a handhold accounted for its being on the car in the first instance.

We encounter no greater difficulty in concluding that the board was a handhold reasonably calculated to contribute toward "greater security to men in coupling and uncoupling cars," if this additional finding is necessary to bring it within the scope of the quoted provision of the Safety Appliance Acts.

The Safety Appliance Acts are remedial and are to be liberally construed so as to effectuate their humane purposes. See: Urie v. Thompson, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018; Lukon v. Pennsylvania R. Co., 131 Fed. 327. But if the rule were otherwise, we think we still would not be justified in holding that men are to be considered engaged in "coupling and uncoupling cars" only while actually manipulating some part of the coupler itself and that only grab irons or handholds which are immediately accessible to persons actually manipulating the coupler are to be considered within the scope of the statute. Assuming that the coupling or uncoupling of cars is the end result sought, we are of the opinion that within contemplation of the statute one is engaged in that work while doing any incidental thing reasonably necessary to or involved in accomplishment of the ultimate purpose. Such an incidental act may consist of going to a place on the car from which to manipulate the coupler itself, of setting the hand-brake, or of any one of a variety of other things. Any grab iron or handhold with which a car is equipped and which contributes to the greater security of men while thus generally engaged in the work of coupling or uncoupling cars is, in our opinion, within the purview of the statute. The board that gave way with appellant clearly falls into this class. Furthermore, the evidence does not exclude the possibility that the board was accessible to persons in some of the positions from which the coupler could be manipulated and was actually used upon occasion by persons engaged in operating the coupler.

The purpose of the Safety Appliance Acts appears to be threefold: (1) To require that cars be equipped

with certain safety appliances. (2) To require that safety appliances be secure. (3) To impose absolute responsibility on railway companies for having cars equipped with secure safety appliances. And we think it was the intent of Congress to require that all appliances which may fairly be classified as appliances mentioned in the Acts shall be secure, irrespective of whether the Acts actually require that cars be equipped with the appliances in the first instance. This is in effect the holding in Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 100 L. Ed. 364, 76 S. Ct. 386, wherein it was said: "If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by section 2." Having in mind that the ultimate object of the Acts is to promote the greater security of men working on trains, it would be highly illogical to hold that the absolute responsibility of a company to keep safety appliances secure extends only to those appliances constituting the bare minimum required by the Acts and not to other similar appliances with which the car is in fact equipped and which extend the same invitation to persons to use and rely on them.

The fact that the board was not a standardized appliance specifically prescribed by the Interstate Commerce Commission does not preclude a judicial determination that it was nevertheless a safety appliance within contemplation of the Safety Appliance Acts. Shields v. Atlantic Coast Line R. Co., supra, 350 U.S. 318, 100 L. Ed. 364, 76 S. Ct. 386.

Counsel for appellee have ably briefed the case within the limits of available precedents. However, as they ap-

parently recognize, the authorities to which they have referred us are not in point on the facts and are beneficial only in a general way.

The judgment of the trial court is reversed and the cause is remanded with instructions that judgment be rendered in favor of the plaintiff. The remand is pursuant to appellee's alternative motion, in order that the defendant may file and present a motion for new trial. By proper counterpoint or cross point, appellee has attacked the jury's finding in respect to damages as being contrary to the great weight and preponderance of the evidence and represents that it desires to present this question by motion for new trial. See DeWinne v. Allen, Tex. Sup., 277 S.W. 2d 95.

JOHN R. ANDERSON,
Associate Justice

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IN THE

Supreme Court of the United States

October Term, 1958

No. 900

THE KANSAS CITY SOUTHERN RAILWAY CO., *Petitioner*

v.

CECIL A. THOMAS, *Respondent*

On Petition for Writ of Certiorari to the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, Sitting at Beaumont

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BRIEF FOR RESPONDENT

To: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Cecil A. Thomas, Respondent herein, respectfully presents this brief in opposition to the Petition for Writ of Certiorari.

Opinions Below

The citation is correct (R. 377). There is no opinion of the Supreme Court of Texas, but it refused Petitioner's Application for Writ of Error on January 8, 1958 (468).

Jurisdiction

Petitioner improperly seeks to invoke the jurisdiction of this Court. There has been no "final judgment" entered in this matter by the Appellate Courts of Texas. This case was reversed and rendered in favor of Respondent, but pursuant to Petitioner's (then Appellee) Alternative Motion in order that Petitioner could file and present a Motion for New Trial, upon the ground of excessiveness. The record to this point does not show that Petitioner has judicially waived the Motion for New Trial. Therefore, it would seem that Section 1257, Title 28, *United States Code Annotated*, would certainly indicate this petition is an improper attempt to invoke the jurisdiction of this Honorable Court.

Question Presented

The Federal question presented here in a State Court suit brought under the Federal Employers Liability Act, is whether a "notched down" plank at the place where the ladder and handholds are located on a railroad gondola car and which was customarily used as a handhold or grabiron by men in switching of cars, was in fact a "handhold" or "grabiron" within the meaning of those terms as used in the Safety Appliance Act.

Statutes Involved

The Statutes involved are Section 1257, Title 28, *U.S.C.A.*; Section 4, Title 45, *U.S.C.A.*

Statement

The Plaintiff in his petition alleged that in addition to certain acts of negligence, the Defendant had violated Section 4, Title 45, *U.S.C.A.*, and that such violation contributed in whole or in part to cause the injuries sustained on the occasion of his fall from one of the Defendant's gondola cars. He further alleged that the Defendant's train was moving in interstate commerce at the time and that both he and the Defendant were engaged in such interstate commerce (R. 12).

The evidence established that the cars in question were being moved for loading of sulphur which was to go to Shipside at Galveston, Texas for export, outside of Texas (R. 94, 95, 96). The testimony revealed that the Plaintiff was injured from a fall to the ground when a wooden railing on the top of the car split when the Plaintiff took hold of it, using it as a handhold in order to pass signals (R. 120, 121).

They were shoving around a curve. The Plaintiff had to throw a switch and the Plaintiff after throwing it climbed up on the car. They had to go around two more curves, and the Plaintiff had to climb up to the top of the car to pass signals to the engine foreman because the engine was out of sight and the engine foreman was ten or twelve cars from the Plaintiff (R. 120).

The gondola cars were used to haul sulphur and were lined with wood on the sides, bottoms and tops (R. 120). There were handholds near the top of this gondola car but one could hardly catch onto it because there is a pretty close clearance there, because it has several board railings around it and the wood was too close (R. 120, 121, 183, 184). In order to pass signals there was no way to stand on top or straddle the top edge without taking hold of the board that formed the top edge of that gondola car (R. 122, 123).

It was dark, there were no lights around (R. 126). The Plaintiff started to the top of the car and the board came off with him and he fell, landing in the ditch (R. 120, 121). The train was moving when he fell (R. 180).

The car in question had a wooden railing on the top, with the end portion cut down (R. 177). The wood was a little too close, with gloves on, to enable a man to get his hand on the top grabiron there, and the switchman will put his arm over (R. 183, 184). The engine foreman himself seldom used the top grabiron. They always threw their arms over there and took hold with the other hand (R. 189, 190, 191). The engine foreman practiced that a whole lot. He generally did it that way. The Plaintiff's duty was to ride the car, pass signals, set a hand brake, throw switches and give the cut off signal for uncoupling the cars (R. 127, 128).

The railing on the top of the car was of oak wood which weather cracks (R. 260). After the Plaintiff was injured the wood railing was removed from the top edge of the gondola car (R. 270). (Ex. P-F).

These were the facts of the case as it was presented to the Jury and upon which they found in answer to Special Issues Nos. 1, 2, 3 and 4 that:

> "(1) The wooden railing placed by the Defendant at the end and top of the gondola car in question was in effect a handhold that could be used by switchmen in coupling and uncoupling cars, (2) was not secure; (3) such condition contributed in whole or in part to cause the injuries of the Plaintiff, and (4) that the wooden railing on the top edge of the Defendant's gondola in question, which was weathered and split, was a dangerous instrument with which to work." (R. 22, 23).

The trial court received the verdict of the jury, but overruled the Plaintiff's Motion for Judgment and entered judgment for Defendant (R. 47).

The Court of Civil Appeals, Ninth Supreme Judicial District of Texas, sitting at Beaumont, reversed the trial court and rendered judgment for the Plaintiff pursuant to the Defendant's Alternative Motion for New Trial on the question of damages, held that "the board that gave way with Appellant (Respondent) was, as a matter of law, something the Safety Appliance Acts required Appellee (Petitioner) to have in secure condition." (R. 379).

The Supreme Court of Texas on December 4, 1957, determined that Petitioner's Application for Writ of Error to the Court of Civil Appeals for the Ninth District presented no error which required reversal of the Judgment of the Court of Civil Appeals, and overruled Petitioner's Motion for Rehearing of such Application for Writ of Error, on January 8, 1958 (R. 468).

Reasons For Not Granting Writ

The reasons for denying the Writ of Certiorari in this instance are twofold.

(1) There is no final judgment from which an appeal should lie, and

(2) The decisions of the Court of Civil Appeals and the Supreme Court of Texas are correct and in conformity with previous decisions of this Court and other Federal Courts.

Argument

I. There is no "Final Judgment" from which an Appeal in the form of a Petition for a Writ of Certiorari Should be Granted.

The last paragraph of the opinion of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, Beaumont, states:

> "The judgment of the trial court is reversed and the cause is remanded with instructions that judgment be rendered in favor of the plaintiff. *This remand is pursuant to appellee's alternative motion, in order that the defendant may file and present a motion for new trial. By proper counterpoint or cross point, appellee has attacked the jury's finding in respect to damages as being contrary to the great weight and preponderance of the evidence and represents that it desires to prevent this operation by motion for new trial.* See DeWinne v. Allen, Tex. Sup., 277 S.W. 2d 91."

It can be seen that no "final judgment" has been entered from which an appeal or an application for writ of certiorari should lie.

This Honorable Court had declined to take jurisdiction on many occasions when cases where "final judgment" were not first had. Section 1257, Title 28, *U.S.C.A.*; *Republic Natural Gas Co. v. Oklahoma*, 68 S. Ct. 972, 976, 334 U.S. 62; *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 73 S. Ct. 196, 344 U.S. 178; *Radio Station WOW v. Johnson*, 65 S. Ct. 1475, 1478, 326 U.S. 120, 123; *Market Street Ry. Co. v. Railroad Commission of California*, 65 S. Ct. 770, 772, 324 U.S. 548, 551; *Richfield Oil Corp. v. State Board of Equalization*, 67 S. Ct. 156, 158, 329 U.S. 69, 72, 73; and *Gospel Army v. City of Los Angeles*, 67 S. Ct. 1428, 1430, 331 U.S. 543, 546, 547.

However, if Petitioner were to judicially waive its right for the filing of a Motion for New Trial based on the one ground of claimed excessiveness (which Respondent, contends is without merit) before the trial court, which has been afforded them by the State Appellate Court decision, a different question would be presented.

II. The Decision of the Court of Civil Appeals and Supreme Court of Texas are correct.

Judgment should have been properly entered for the Respondent upon the verdict of the jury, since under the law, the proof showing what it did, it was a question of *fact* for the jury to decide that the wooden railing was a statutory handhold, and the jury having so found, the failure to enter judgment for the Respondent and the entering of the judgment for the Petitioner instead would have amounted to an usurpation of the jury function by the Court.

But, even if it be thought that the jury was not entitled to pass on the question of the railing being a statutory handhold, or that their finding did not amount to that, then the trial court should have entered judgment for the Respondent instead of entering judgment for the Petitioner because under the authorities it was a handhold, which should have been secure under the Safety Appliance Act. In this the Court of Civil Appeals of Texas correctly rectified the error of the trial court.

There seems to be no disagreement in the record about what occurred. It was so apparent that the wooden railing placed on the top edge of the gondola car involved was in the nature of a handhold, because of it being notched down at the point of the ladder to a smaller dimension than the balance of the railing, and was customarily used by the switchmen for such handhold, and its use as such was rendered necessary by reason of the fact that the top rung of the ladder or the top grabiron or handhold did not have sufficient clearance so that a gloved hand would get between it and the wooden railing, that the trial court submitted to the jury Special Issues 1, 2 and 3 requiring as to its use as a handhold, its insecurity and its relation to the injury. It is so obvious from the record that each of these findings were amply supported by the evidence that the jury answered them affirmatively, although they did not seek to find the railroad negligent in the other particulars charged as a basis for recovery. It is obvious that the pleadings were supported by the proof adduced and that proof confirmed the pleadings in each detail as to the violation of the Safety Appliance Act.

It was only the error of the trial court in entering judgment for the Petitioner on the verdict that stood in the way of the recovery the Respondent was entitled to receive. This the Court of Civil Appeals of Texas corrected by its judgment.

There is, of course, no question but that the Respondent and other employees of the Petitioner *used* the railing in question as a handhold. That its shape, size, form, place of attachment or method of attachment was not that of an ordinary handhold as is commonly seen, would not alter the use to which the railing was being put, and as was said in the case of *United States v. Boston & M. R. Company*, 168 Fed. Reporter, 148 (Mass.). A portion of the opinion is set out below. That was a case where the railroad was charged with a violation of the Safety Appliance Act in failing to have a grabiron or handhold on the end of a car. The Court charged the jury as follows:

> ". . . If at any place in the end of this car there was not a grabiron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grabiron or a handhold at that point, then I shall instruct you that the law has not been violated in so far as a grabiron or handhold at that point is concerned. Having something there which performs all the functions of a grabiron or a handhold is just the same thing as having what is properly called a grabiron or a handhold at that point. It may not be possible to say that a coupling lever or a ladder is a grabiron or a handhold, but if it affords the same security to a man who may need to use one that a grabiron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated."

It having been seen that this use of the railing was that of a handhold that it need not necessarily be in all respects a handhold that conforms in size, shape, method of attachment and location to other handholds to be a handhold, it is the function of the jury to pass upon whether or not it in effect or actually was a handhold. This was certainly brought out clearly in the case of *Bramlett v. Southern Railway Company*, 82 Southeastern Reporter, 501 (Supreme Court of South Carolina). This was a case in which the Plaintiff was injured by reason of the defective condition of a footboard of an engine which was running backwards while he was attempting to jump on the foot-board. The Federal statute forbids the use of defective running-boards and the board on it which was complained of, is a foot-board and a foot-board is not within the provisions of the Federal statute that was being invoked in this case. In the petition the board was called a foot board. In the answer of the railroad it was called in one paragraph a running-board, in another paragraph it was called a foot-board. In cross-examining the Plaintiff the railroad counsel asked the Plaintiff about the running-board. In the trial of the cause the railroad's attorney used the terms foot-board and running-board interchangeably.

The Court held that the trial court

> ". . . has only left it *properly to the jury to say whether the board was a 'running-board.' If it was a 'running board', then the Plaintiff was within the protection of the statute if it was defective. These were questions of fact.* The judge told the jury that the Federal Statute alone applied."

The Boiler Inspection Act is similar to the Safety Appliance Act in so far as construction of the Act is con-

cerned. In the case of *Davis v. Callen*, 250 S.W. 305 (Tex. Civ. App.) which was a suit for damages under the Boiler Inspection Act by a fireman on the M. L. & T. RR. & S.S. Co. engaged in interstate commerce. While he was manipulating the shaker bar moving the grates in the fire box, it slipped off the lever causing him to fall and be injured.

Affirming a judgment for the Plaintiff, the Court said in part:

> "Appellant was under the absolute duty to keep the shaker bar in proper condition and safe to operate, so that it could have been used by Appellee 'without unnecessary peril to life or limb.' As Congress has used language charging a railroad company with the absolute and unqualified duty to have certain of its appliances in a safe condition at all times, the Supreme Court of the United States has held, in the decisions cited supra, that it is the duty of the courts to do nothing less than give full force to the language of the statute. The charge requested by appellant emasculated the act and measured his duty to appellee by the rules of common law. Therefore the trial court correctly refused to submit it.
>
> "*Appellant would distinguish this case* from those cited, supra, *on the ground that the Interstate Commerce Commission has not promulgated any rule defining how tight the shaker bar must fit over the end of the lever attached to the grates.* In answer to this, it is sufficient to say that his duty in this respect was fully defined by the statute and *submitted to the jury in the charge as given.* As we understand the Safety Appliance Act and the decisions construing them, the Interstate Commerce Commission has the express authority to prescribe the character of appliances to be

> used, *but when this power has not been exercised by it in relation to any particular appliance, the railroad company must exercise its common-law duty in selecting such appliance, but, when the selection has been made and the appliance placed in the hands of an employee, it then rests under the absolute duty to keep it in a safe and proper condition, so that it can be used 'without unnecessary peril to life or limb.'"*
>
> See also to the same effect *Louisville N. R. Co. v. Botts*, 173 F. (2) 164, and *Delevie vs. Reading Co.*, 176 F. (2) 496.

And so it is here, the handrail was not designated by the Interstate Commerce Commission as anything, appliance or anything else, to be or not to be placed on the gondola car in question. However, since the Petitioner saw fit to place such a railing at the place it did, and at the place on the car where the ladder or handholds or grabirons are placed, and notched it out so that it could be used by the employees as a handhold, and which could be used by such employees for greater safety in coupling and uncoupling cars, the Defendant then had the *absolute duty to keep it in a safe and proper condition*, that is secure. Its failure in this instance so to do renders the Petitioner absolutely liable to the Respondent for the injuries to which such insecure handhold contributed in whole or in part.

Any contention that the failure of the Interstate Commerce Commission to prescribe appliances is a ruling that such appliances are not to be considered as appliances or if used need not be made secure, has been definitely laid to rest by this Honorable Court in the cases of *Baltimore & O. Ry. Co. v. Jackson*, 77 S. Ct. 842, 846 (6, 7), and *Shields v. Atlantic Coast Line Railroad Company*, 76 Sup. Ct. 386. In the latter case there was a question whether an

addition of a running-board which was not required by the I. C. C. would be such a safety appliance as would fasten absolute liability on the part of the railroad for failure to keep it secure. This Honorable Court said in deciding this question:

> ". . . The question presented here is whether this device, which for convenience we shall call a dome running board, is a safety appliance within the meaning of Sections 2 and 3 of the Safety Appliance Act of 1910. Act of April 14, 1910, c. 160, Sections 2 and 3, 36 Stat. 298, 45 U.S.C. Sections 11 and 12, 45 U.S. C.A. Sections 11, 12.
>
> "Petitioner brought suit in the District Court, alleging in one count of his amended complaint absolute liability for a violation of the Act and in a second count common-law negligence. *The jury returned a general verdict in his favor.* The Court of Appeals reversed and remanded for a new trial on the negligence count alone, holding that the trial court erred in instructing that the dome running board was a safety appliance. 220 F. 2d 242. We granted certiorari because of the importance of the questions raised as to the proper interpretation of the Safety Appliance Act. 350 U.S. 819, 76 S. Ct. 61."
>
> ". . . Under the authority of Section 3, the Commission in 1911 promulgated regulations still in force providing in detail for one running board running around the perimeter, or at least the full length of the sides, of tank cars. Such a board enables a trainman to walk the length of a tank car between cars adjoining it on either end. The regulations make no mention whatever by any name of dome running boards. Petitioner nevertheless contends that the dome running board is a required running board affording him protection under Section 2.

"The obvious purpose of a dome running board is to provide a secure flooring for those who must perform operations in connection with the tank car dome. Clearly the dome running board has major importance in loading and unloading operations. *But a railroad man of over twenty-five years' experience testified that it also may be used to stand on in order to pass hand signals* or repair minor troubles occurring while the train is en route. The dome running board is an integrated part of the exterior equipment of a tank car; it functions as a permanently attached outside 'floor' near the dome of the car. The testimony showed that *railroad men*, including respondent's employees often *refer to the dome running board as a running board. We hold that it comes within the meaning of the term 'running boards'* as used in Section 2.

"The fact that the Commission in its 1911 regulations under Section 3 *has not specified uniform standards* for dome running boards *is not a binding administrative determination that they are not running boards for the purposes of Section 2.*

". . . The purpose of Section 3 is to standardize the appliances required by Section 2. *But it does not follow that appliances necessary and furnished for the safe use of the car, although not standardized under Section 3, are not within the sweep of Section 2. Clearly, those who work on train cars may have necessarily to rely on the security of a dome running board, although the purposes of that appliance may not require any unhesitating reliance on its uniform characteristics."*

". . . See also Southern Pac. Co. v. Carson, 9 Cir., 169 F. 2d 734, holding a railroad liable under Section 2 for defects in an independent wooden club used to help turn a brake wheel where the wheel itself complied with the Commission's regulations, which made

no mention of the club. We conclude that failure of the Commission to standardize the dome running board need not mean that it was not a required running board under Section 2. *To hold otherwise would relieve railroads from the absolute duty under Section 2 to make safety appliances secure wherever new appliances are adopted which have not yet been standardized by the Commission.*"

". . . At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. *If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by Section 2. Cf. Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874.

"The Commission, in a brief filed here, contends that only appliances designed to insure safety while the train is in movement are within Section 2, and, therefore, a dome running board cannot be a statutory running board. No case is cited to support this construction. Nothing in the language of Section 2 itself or in its legislative history indicates that it should be read so narrowly. Whether or not an appliance is designed to afford protection while the train is moving may provide the Commission with an appropriate guide for deciding which appliances should be standardized under Section 1. But there is no reason to import such a distinction into Section 2 in order to deny the humane benefits of the Act to those who perform dangerous work on train cars that are not moving. Section 2 is not limited to such running boards as are required only in the movement of the train. The dome running board here was required for the use of the car. Section 2 required it to be safe,

although regulations pursuant to Section 3 had not standardized it.

". . . The judgment below must be reversed and the judgment of the District Court reinstated."

In the instant case all of the points raised and held to rest by this Honorable Court are present in: (a) the Respondent based his suit on both the proposition of negligence and violation of the Safety Appliance Acts; (b) the jury returned a verdict in the Respondent's favor; (c) the Interstate Commerce Commission promulgated regulations providing for the placement and dimensions of handholds, grabirons and ladders; (d) there is no regulation or regulations of a rear ending handhold or sidesill leading grabiron even; (e) the Respondent contends that such ending is a handhold required to be secure under Section 4 of the Safety Appliance Acts; (f) railroad cars with such equipment omitted that such ending may also be used as a handhold to gain load capacity; (g) railroad cars often used and relied on such ending as a handhold and relieved us of a safe; and (h) there was such an omission car may have reasonably to rely on the existence of such ending as a handhold, although the purpose of that appliance may not require an unbroken ribbon or its uniform characteristics of left thereof. As we view the matter, and as held by this Honorable Court, since the omission and which was found by the jury and held by the Court of Civil Appeals, to be an effect, a handhold which was furnished by the railroad and used by the railroad through its employees, as an appliance necessary for the use of the car, it must be a safe hand or handhold as required by Section 4.

In view of the fact that there will be some contention that the hand that was used by the Inspectors and other employees of the Petitioner was not intended to be a handhold by the occupants of the seats that it was placed there, yet the Petitioner cannot say that it did not know that such hand was used as a handhold when in fact its own foremen used it for such purpose as did other employees.

The Petitioner cannot avoid liability on the contention that it did not furnish such seat as a chattel, which the users thereof knew was not intended for such purpose, for the same general proposition was brought out in the case cited in this charge and in the knowledge of the employer of the use of the appliance for a purpose other than that claimed by the Petitioner goes it to the same position as if the employer had originally furnished it for the purpose.

In the case of Detroit Steel & Iron Company v. Johnson, 61 Southern Reporter 681 (Supreme Court of Georgia) the Plaintiff was working for the Defendant in the shoeing of the mule of the Defendant's boiler house. While working among the mules, Johnson in one end of a piece of timbering and in order to reach the point where the other end had to be nailed attempted to walk along a narrow beam by doing so he came up a beam which ran from the beam diagonally to the wall. The beam appeared to be firmed. In fact it was insecure. In ascending on one around it he caught a hold of the beam. It fell and he with it. He claimed negligence on the part of the employer in maintaining the beam in an insecure condition. The Defendant contended that the beam was not designed to be used as a handhold and therefore there was no liability on the part of the master. The Court had the following to say:

". . . For if the master directs an appliance to be used, or knows that it will reasonably be used for some purpose other than that for which it was originally intended, he puts it in the same position as if he had originally furnished it for that purpose."

In the case of *Wellinger v. Terminal R. Assn. of St. Louis*, 183 S.W. 2d 908 (Supreme Court of Missouri).

In this case the Plaintiff was getting off of a mail truck when the side of the truck gave way, throwing him to the ground and causing him to suffer permanent injuries. The Defendant contended that the Plaintiff had used the side bar of the mail truck for a purpose for which it was not intended and therefore was not entitled to recover.

The Court held:

"In our opinion, we should not hold, as a matter of law, that there was a diversion of the instrumentality for the purpose for which it was intended within the meaning of the qualification of the general principles which we have mentioned supra. Although the primary purpose of the side bars was to retain mail pouches and parcels of baggage upon a platform of the truck, the use of the side bars in alighting should have been anticipated as a convenient, expedient and natural means of getting off the truck. And, in view of the evidence of the practice of the Defendant's employees which Defendant must have known, we believe the Plaintiff's case was clearly submissible *to a jury*."

See also *Kaumans v. White Star Gas & Oil Company*, 63 P. 2d 231; *Wood v. Bichler Mfg. Company*, 208 S.W. 481 (C.A. Mo.); *Hampton v. Pacific Elect. Ry. Co.*, 257 P. (2nd) 703 (Cal. V.C.A.).

While the Statute, under which the Respondent sought his recovery, provides that the secure grabirons should be placed on the cars for "greater security to men in coupling and uncoupling cars," the Statute covers the situation here, even though at the moment of his injury the Plaintiff was not in the act of coupling or uncoupling cars as is held in the case of *Director General of Railroads v. Ronald*, 265 Federal Reporter 138 (CCA 2nd Cir.):

> ". . .But it is not necessary that the employee should be injured while coupling or uncoupling. If the grabiron could be said in getting to the point where the cars were to be coupled or uncoupled, it would be within the section." . . .
>
> "The legislation was clearly for the safety of employees. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in the light of the automatic coupling requirements sections, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. The Supreme Court has placed no such construction upon these statutes when it has had the occasion in the past to refer to them."
>
> "In construing the statute, it is essential that we obtain as far as possible the legislative intent. In so doing, we must gather such intent from the title, text and context. Here we must apply common knowledge of danger in alighting from or boarding cars, which we must assume Congress had in mind, and that such danger existed in infinitely more cases than the mere alighting or boarding of cars for the purpose of coupling or uncoupling them."

The Federal Safety Appliance Act and the Federal Employers Liability Act, under which this case has been brought, are to be given liberal construction in order to accomplish their humanitarian purposes. See *Urie v. Thompson*, 69 Sup. Ct. 1018 337 U.S. 163; *Carpenter v. Atchison, T. & S. F. Ry. Co.*, 240 P. 2d 5; *Johnson v. Southern Pac. Co.*, 25 S. Ct. 158; *Colorado v. Central R. Co.*, 180 F. 832, affirmed, 192 F. 901, error dismissed, 33 S. Ct. 111; *In re Second Employers' Liability Cases*, 32 S. Ct. 169; *Horton v. Oregon-Washington R., etc. Co.*, 130 P. 897; *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327; *Bocook v. Louisville & N. R. Co.*, 67 F. Supp. 834; *Lukon v. Louisville & N. R. Co.*, 137 F. 2d 327.

The Acts are remedial and should have a liberal construction to advance the remedy proposed and to correct the evils against which they were directed. They were designed to enlarge—not to restrict—the rights of the injured workmen. *Baltimore, etc. R. Co. v. Branson*, 98 A. 225; *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 F. 949; *Graham v. Thompson*, 212 S.W. 770 (Mo.); *Ermin v. Pennsylvania R. Co.*, 36 F. Supp. 936; *Albright v. Pennsylvania R. Co.*, 37 A. 2d 870, cert. denied, 65 S. Ct. 72.

In the case of *Missouri-Kansas-Texas R. Co. v. Evans*, 250 S.W. 2d 385, the Supreme Court of Texas had the following to say:

> ". . . The protection of the Safety Appliance Act has been held to extend to those inspecting cars. *Idem. The statute 'has been liberally construed' so as to give a right of recovery for every injury, the proximate cause of which was a failure to comply with a requirement of the Act.* Swinson v. Chicago, St. P., M. & O. R. Co., 294 U.S. 529, 55 S. Ct. 517,

79 L. Ed. 1041, 96 A.L.R. 1136; Carter v. Atlanta & St. A.B.R. Co., 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236, (5). In Davis v. Wolfe, 263 U.S. 239, 44 S. Ct. 64, 66, 68 L. Ed. 284, after reviewing the earlier cases, the court held that one can recover "if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The interpretation of these Acts are controlled by the Federal Statute and adjudications by the Federal Courts. As was said in the case of *Texas and Pacific Railway Company v. C. B. Younger*, 262 S.W. 2d 157, Ref. N.R.E.:

"In the disposition of this interesting and important question we are controlled entirely by the Federal Statute and adjudications by the Federal courts. While suits under the Federal Employers' Liability Act may be maintained in appropriate courts of any state, we are dealing with rights afforded the parties by the laws of the United States and not by state laws. Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Chelin v. Houseman, 93 U.S. 130, 23 L. Ed. 833; Seaboard Air Line Railway v. Horton, 233 U.S. 492, 58 L. Ed. 1062; 34 S. Ct. 635; Chesapeake & O. R. Co. v. Kuhn, 284 U.S. 44, 76 L. Ed. 157, 52 S. Ct. 45.

"No substantive right of any party to such suits may be impaired by any local statute, rule of decision, or forms of local practice. Davis vs. Wechsler, 263 U.S. 22, 68 L. Ed. 143, 44 S. Ct. 13; Macy v. Granelli Chemical Co., 303 U.S. 197, 82 L. Ed. 745, 58 S. Ct. 507; Brady v. Southern R. Co., 320 U.S. 476, 88 L. Ed 239, 64 S. Ct. 232; Chesapeake & O. R. Co. v. Staple-

ton, 279 U.S. 587, 73 L. Ed. 861, 49 S. Ct. 442. This immunity extends to the pleadings, and a state's rule that a pleading will be construed strictly against the pleader has no application in a suit in the state court under this Act. Brown v. Western Ry. of Alabama, 338 U.S. 294, 94 L. Ed. 100; 70 S. Ct. 101. And what constitutes negligence for the statute's purposes is a federal question, and it does not vary in accordance with different conceptions of negligence under state laws, and we are governed by federal decisional law in formulating the concept of negligence. Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 96 L. Ed. 398, 72 S. Ct. 312; Urie v. Thompson, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018.

"The character and amount of evidence required to establish negligence in a suit under the Federal Employers' Liability Act is not subject to the control of the states in whose courts such suits are tried, *and therefore whether there is an issue for the jury is a federal question.* Chicago, M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; Chesapeake & O. R. Co. vs. Stapleton, supra; Chesapeake & O. R. Co. v. DeAtley, 241 U.S. 310, 60 L. Ed. 1016, 36 S. Ct. 564."

Under the Federal Employers Liability Act, the question of what constitutes negligence as well as its causal relation to the injury are matters upon which the jury should pass, as is shown by these recent decisions of this Honorable Court:

Thompson v. Texas & Pacific Ry. Co., 77 S. Ct. 698;
Earl R. Dean v. Gulf, Colorado & S. F. Ry. Co., 77 S. Ct. 715;
Ferguson v. Moore-McCormack Lines, 77 S. Ct. 457;
Rogers v. Mo. Pac. RR. Co., 77 S. Ct. 443;

Webb v. Illinois Central RR. Co., 77 S. Ct. 451;
Ringhiser v. C. & O. Ry. Co., 77 S. Ct. 1093;
Arnold v. Panhandle & S. F. Ry. Co., 77 S. Ct. 840;
B. & O. Ry. Co. v. Jackson, 77 S. Ct. 842;
Gibson v. Thompson, 78 S. Ct. Pg. 2.

The fact that the jury also returned a verdict of unavoidable accident and failed to find any negligence on the part of either the railroad or the Respondent would not in itself authorize the entry of a judgment for the Petitioner, particularly in view of the fact that the cause was submitted on both grounds, that of violation of the Safety Appliance Act as well as on negligence under the Federal Employers Liability Act. The jury, having found that the wooden railing was in effect a handhold which was insecure, the insecurity of which contributed to cause his injuries, would rather require the entry of a judgment for the Respondent. In the case of *Givens v. Missouri-Kansas-Texas R. Co. of Texas*, 195 Fed. 2d 225, Judge Rives of the Fifth Circuit rendered the opinion for the Court reversing the trial court which entered a judgment for the Defendant upon similar findings.

The only case cited by Petitioner in support of its contentions is the case of *Atchison, Topeka & Santa Fe v. Scarlett*, decided by this Honorable Court in 1937, reported at 57 S. Ct. 541, 300 U.S. 471, is not authority for a contrary view to this Court's more recent holding in the case of *Shields v. Atlantic Coast Line Ry. Co.*, 76 S. Ct. 386, decided in 1956. The holding in the *Scarlett* case refuted the contentions of the Plaintiff that a brace rod placed diagonally on side of a car under a ladder which did not lessen the statutory or I.C.C. regulatory clearances, amounted to a violation of the Safety Appliance Act. The

holding in the *Shields* case, and the contention of the Plaintiff here, is on the other hand an entirely different matter, it being simply that an additional appliance in the nature of a safety appliance which could be and were used customarily by men in their work in coupling and uncoupling cars, must be as secure as a designated safety appliance or it becomes a violation of the Safety Appliance Act notwithstanding a failure on the part of the Interstate Commerce Commission to issue a regulation requiring the installation on the cars of such additional "safety" appliances.

There is no conflict between the two decisions.

It is the contention of Respondent that the reversal of the Judgment of the trial court should be, for all of the reasons heretofore stated, affirmed and judgment rendered for the Plaintiff as of the date of the entry of the erroneous judgment with interest to run on such correct judgment from that date.

See *Givens v. Missouri-Kansas-Texas R. Co. of Texas*, 196 F. 2d 905.

III. There are no Grounds Under Rule 19 of This Court for Granting a Writ of Certiorari.

A. *The decision is not in conflict with the decision of this or other courts.*

As has been demonstrated heretofore, the decision of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is not in conflict with the prior decision of this Court or of other Federal Courts, it follows the spirit as well as the letter of the law as laid down

by this Honorable Court in *Shields v. Atlantic Coast Line Ry. Co.*, supra, and *B. & O. Ry. Co. v. Jackson*, supra. Further the opinion is not in conflict with the earlier decisions of Federal Courts and other Courts construing the Federal law, such as the *United States v. Boston & M. R. Company*, 168 Fed. Reporter, 148 (Mass.), *Bramlett v. Southern Railway Company*, 82 Southeastern Reporter, 501 (Supreme Court of South Carolina), and *Davis v. Callen*, 250 S.W. 305. (Tex. Civ. App.).

B. *This is not a decision of an important state question in conflict with applicable state law.*

Since this case involves a Federal question, there is no decision of important state question in conflict with applicable state law.

C. *The decision presents no important question of Federal law.*

The decision presents no important question of Federal law which has not already been decided since the law is clearly followed by the decision in question.

Conclusion

First, there being no "final judgment" from which an appeal could be taken, this Honorable Court is not required to take jurisdiction. If, however, by action of Petitioner, a "final judgment" becomes a certainty, or if this Honorable Court feels that the question presented is such a grave matter that it should exercise jurisdiction, then Respondent earnestly contends that the Petition for Writ of Certiorari should be denied for the additional reasons shown.

As has been demonstrated, the thing which brought about the Respondent's injury was defective and even a dangerous instrumentality in its weathered and split condition. It was placed on the car in question and many others by the Railroad. It was designed to be used as a handhold. It could be used as a handhold. It was used as a handhold or grabiron, with the full knowledge of the Railroad. It in fact was a handhold. The jury so found, and judgment originally should have been entered for the Respondent under the uniform holdings of the Federal Courts under the Federal Law. To do otherwise would usurp the functions of the jury by substituting the Trial Court's findings that such instrumentality was not a handhold. It was error on the part of the Trial Court to hold in effect, by entering judgment for the Railroad and against the Respondent, that unless an instrumentality has been specifically designated as a handhold by the Interstate Commerce Commission, it cannot be considered as such and that no liability for injury occasioned by its defective or insecure condition can be charged to the employer Railroad.

This narrow and restricted view, as contended for by Petitioner, is contrary to and in conflict with the host of decisions holding that the Safety Appliance Act should be construed liberally because of its remedial character. The entering of judgment for Petitioner in this case would be an action in conflict with the prior decision of this Honorable Court which has held that an instrumentality placed on a car that can be and is used as a safety appliance by men in their work is a safety appliance, even though the Interstate Commerce Commission's regulations are silent concerning it, and the Petitioner has the continu-

ing absolute duty to maintain such appliance in a secure condition for the safety of the men using it, the same as if it had been so designated.

WHEREFORE, the Respondent prays that the obviously correct judgment of the Honorable Court of Civil Appeals be in all things affirmed and the Petition for Writ of Certiorari be in all things denied, and for the recovery of all costs herein, in the Supreme Court of Texas, in the Court of Civil Appeals of Beaumont, Texas, and in the Trial Court.

Respectfully submitted,

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Certificate of Service

Attorneys for Petitioner Cleve Bachman and Major T. Bell, First Federal Savings Building, Beaumont, Texas, have been each furnished a copy of this brief by mailing the same to them at the above stated address.

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GEORGE L. SCHMIDT